

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL FIORITO,
Petitioner,
v.
WARDEN,
Respondent.

No. 2:23-cv-3054 WBS AC P

ORDER

Petitioner is a federal prisoner proceeding pro se with a habeas corpus petition filed pursuant to 28 U.S.C. § 2241. On February 9, 2024, respondent filed a motion to dismiss the petition. ECF No. 7. After petitioner failed to respond, he was given an additional twenty-one days to file an opposition or statement of non-opposition to the pending motion. ECF No. 8. In the same order, petitioner was informed that failure to file an opposition would result in a recommendation that this action be dismissed without prejudice for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). Id. When petitioner once again failed to respond, the undersigned recommended that the action be dismissed for failure to prosecute. ECF No. 9. Petitioner has now filed objections in which he states that he never received a copy of the motion to dismiss, which was filed around the time he was transferred to another facility. ECF No. 10. He blames respondent for failing to inform the court that he was in transit at the time the motion was filed, and accuses counsel of acting unethically by moving to dismiss while he was in transit. Id. at 3-4.

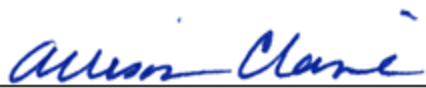
Contrary to petitioner's assertion, respondent is not to blame for his failure to receive a copy of the motion to dismiss. The file reflects that nearly three months after the motion to dismiss was filed, petitioner's address of record was updated when petitioner filed a new case in this court. Respondent's motion to dismiss was properly served on petitioner's prior address. See L.R. 182(f) (absent filing of a notice of change of address, "service of documents at the prior address of the . . . pro se party shall be fully effective").

Nonetheless, because petitioner did not receive a copy of the motion to dismiss, the findings and recommendations will be withdrawn, and respondent will be required to re-serve petitioner at his current address of record. Petitioner is advised that failure to file a response will result in a recommendation that this action be dismissed. Petitioner is further cautioned that it is his responsibility—not respondent's or the court's—to update his address of record in each of the cases he has proceeding in this court and that updating his address in one case does not guarantee that the court will update his address in all pending cases. Failure to keep this the court updated on his current address in this case may result in a recommendation of dismissal.

Accordingly, IT IS HEREBY ORDERED that:

1. The April 16, 2024 findings and recommendations (ECF No. 9) are WITHDRAWN;
2. Within seven days of the service of this order, respondent shall re-serve petitioner with a copy of the motion to dismiss; and
3. Petitioner's response to the motion to dismiss is due thirty days after the motion is re-served. Failure to file a response will result in a recommendation that this action be dismissed.

DATED: May 22, 2024


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE